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Nos. 89-1452 and 89-1453

In the Supreme Court of the United States

OCTOBER TERM, 1990

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL., PETITIONERS

v.

UNITED DISTRIBUTION COMPANIES, ET AL.

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

UNITED DISTRIBUTION COMPANIES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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In Order No. 451, issued in 1986, the Federal Energy Regulatory Commission eliminated the anachronistic, multi-tiered system of vintage pricing that then existed for "old" gas (gas dedicated to interstate commerce prior to enactment of the Natural Gas Policy Act of 1978 (NGPA)). As we explain in our opening brief (FERC Br. 10-13, 27-29), the Commission determined, after exhaustive analysis, that the vintage-pricing system failed to assign a reasonable share of the "replacement" cost of developing new supplies to purchasers of old gas and cre-

ated artificial regional disparities, production disincentives, and other substantial distortions in the natural gas market. Exercising its authority under Sections 104(b)(2) and 106(c) of the NGPA to allow higher rates for old gas if they are "just and reasonable within the meaning of the Natural Gas Act," the Commission collapsed the fifteen "vintages" of old gas into a single category subject to a single price ceiling—the ceiling already in effect for one of those fifteen vintages (post-1974 old gas). That ceiling had previously been found by the Commission to be "just and reasonable" within the meaning of the Natural Gas Act (NGA) because it was based on then-current costs of exploration and production, had been sustained by the D.C. Circuit, and had been carried forward by Congress itself through Section 104(b)(1)(A) of the NGPA. After reexamining the issue in light of current data, the Commission concluded that this ceiling, as adjusted for inflation pursuant to the NGPA, continued to reflect the long-term replacement cost of developing new supplies and therefore continued to be just and reasonable. FERC Br. 6-7, 12-13, 20, 27-28.

The court of appeals did not disturb the Commission's judgment that the single price ceiling for old gas under Order No. 451 satisfies the requirement that a higher ceiling be "just and reasonable within the meaning of the Natural Gas Act." The court nevertheless held that the Commission was without authority to adopt that ceiling, holding that Sections 104(b)(2) and 106(c) must be construed much more narrowly to permit price increases only on a case-by-case basis in special circumstances. We show in our opening brief (FERC Br. 5-8, 24-38) that this holding is contrary to the text and legislative history of the NGPA and to the settled administrative and judicial interpretation of the NGA's "just and reasonable" standard at the time it was incorporated into Sections 104(b)(2) and 106(c).

I. Adopting the view of the court of appeals, respondents' principal submission (Br. 32-47) is that the single

price ceiling adopted by the Commission in Order No. 451 is inconsistent with the NGPA, whether or not that ceiling is "just and reasonable within the meaning of the Natural Gas Act." They argue that Sections 104(b)(1)(A) and 106(a) of the NGPA essentially froze, for all time, the prior system of vintage pricing for old gas and the general rate levels established under that system (adjusted for inflation), and that Sections 104(b)(2) and 106(c) should be narrowly construed to authorize the Commission to grant only "special relief" from those frozen rates on a case-by-case basis, such as where they are confiscatory as applied. Thus, in respondents' view, Sections 104(b)(2) and 106(c) do not permit the Commission to increase the price ceilings themselves and, in particular, do not permit the Commission to do so to create incentives for the production of additional supplies of gas. Instead, respondents maintain that the price ceiling for any vintage of old gas must be based exclusively on the historical costs of developing that gas. This argument is wrong in every respect.

A. The most basic flaw in respondents' submission is that it flies in the face of the statutory text. To be sure, Sections 104(b)(1)(A) and 106(a)(1) of the NGPA carried forward for the time being the applicable "just and reasonable rate * * * established by the Commission" (adjusted for inflation) as the maximum lawful price for old gas that was committed or dedicated to interstate commerce when the NGPA was enacted. But Sections 104(b)(2) and 106(c) both expressly provide that the Commission may, "by rule or order," prescribe a "higher" ceiling price for any such gas, "or any category thereof," as long as the new ceiling also is "just and reasonable within the meaning of the Natural Gas Act." We agree with respondents that this language permits the Commission to issue an "order" granting a particular producer special relief from the ceiling that is otherwise applicable to a category (vintage) of old gas. But the language permitting the Commission to establish a higher maximum lawful rate by a "rule" applicable to "any category" of old gas clearly contemplates rate in-

creases of general applicability as well, where, as here, the new ceiling is "just and reasonable within the meaning of the Natural Gas Act." Thus, far from being "inconsistent" with the NGPA, as respondents assert (Br. 32), the ceiling price for old gas under Order No. 451 is expressly authorized by the NGPA.

B. Respondents do not dispute that the text of Sections 104(b)(2) and 106(c) squarely supports the Commission's actions (see Br. 32-33), but they ask the Court to ignore the plain meaning of those provisions and to look instead to the structure, legislative history, and administrative interpretation of the NGPA. In fact, those sources of guidance likewise support the validity of Order No. 451.

1. Respondents contend (Br. 33-37) that the NGPA, "read as a whole," embodies a legislative compromise under which preexisting price ceilings for old gas were frozen (subject to adjustment for inflation) in return for the eventual deregulation of new gas. Nothing in the Act's structure, however, supports respondents' rigid view of the legislative compromise as it affects old gas, or otherwise detracts from the Commission's interpretation of Sections 104(b)(2) and 106(c).

Congress sought in the NGPA to eliminate the severe gas shortage in the interstate market caused by the complex system of rates applicable to different vintages of gas, under which price ceilings for interstate gas sales fell significantly below the price for gas in the intrastate market. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd. (Transco)*, 474 U.S. 409, 420-421 (1986); *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 330-331 (1983). The NGPA therefore instituted a national market for natural gas and directed the Commission to "overse[e] a national market price regulatory scheme." *Transco*, 474 U.S. at 421. To that end, Sections 102 through 109 of the NGPA established an "exhaustive categorization of natural gas production" and "set[] forth a methodology for calculating an appropriate ceiling price within each category." *Mid-Louisiana Gas*, 463 U.S. at 332. The ceiling for each category was initially established either in terms of a dollar figure per

million Btu's or (as in the case of old gas) in terms of a previously existing price, but it is then adjusted upward over time according to a statutory formula. *Id.* at 333. This automatic upward adjustment, which was made equally applicable to old gas and new, refutes respondents' contention (Br. 34-36) that the NGPA mandates a purely historical-cost approach in setting price ceilings for old gas and precludes the Commission from taking into account the very considerations that led to enactment of the NGPA: the need to create incentives for developing additional supplies and the need to bring order to the natural gas market. The Court recognized as much in *Mid-Louisiana Gas*, explaining that "[i]n *each* category of gas"—necessarily including the categories of old gas covered by Sections 104 and 106—"the statute explicitly establishes an *incentive* pricing scheme that is wholly divorced from the traditional historical-cost methods applied by the Commission in implementing the NGA." 463 U.S. at 333 (emphasis added).

For some categories of gas, "the NGPA ceiling prices [were] an intermediate step on the path from a fully regulated industry to a deregulated industry." *Mid-Louisiana Gas*, 463 U.S. at 336 n.14. Thus, "the price ceilings for certain 'high-cost' gas were eliminated in 1979, for certain 'old' intrastate gas and 'new' gas in 1985, and for certain other 'new' gas in 1987." *FERC* v. *Martin Exploration Management Co.*, 486 U.S. 204, 207 (1988); see 15 U.S.C. 3331. By contrast, the NGPA itself does not lift price controls for old gas or raise the grandfathered price ceilings beyond the levels they attain under the automatic adjustment mechanism. But this does not mean that the NGPA bars the *Commission* from raising those ceilings if circumstances warrant. To the contrary, as the Court pointed out in *Mid-Louisiana Gas*, Congress recognized that even a price ceiling generated by the NGPA's new "incentive pricing scheme" for old gas "may be too *low* and authorize[d] the Commission to raise it whenever traditional NGA principles would dictate a higher price." 463 U.S. at 333. The fact that Congress anticipated that the incentives furnished by the

NGPA's automatic adjustments might be insufficient as applied to old gas strongly supports the Commission's decision to consider the need for *additional* incentives in fashioning the price ceiling in Order No. 451.

This conclusion is also strongly supported by the NGPA's use of the NGA's familiar "just and reasonable" standard to guide the Commission when prescribing a higher price ceiling for old gas. As we have explained (FERC Br. 3-8, 31-34), prior to the NGPA, that standard had consistently been construed in a broad and flexible manner. Of particular relevance here, the Commission, sustained by this Court and other courts, had "shift[ed] from a pure historical-cost-based to an incentive-price-based approach," *Mid-Louisiana Gas*, 463 U.S. at 330, "spread[] * * * over both old and new gas" the cost of developing additional sources of supply, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 320 (1974), and incorporated replacement-cost methodology in its ratemaking. J.A. 77-81. Indeed, shortly before the NGPA was passed, the Commission had "temporarily abandon[ed] the practice of vintaging," *Mid-Louisiana Gas*, 463 U.S. at 330 n.10 (citing Order No. 699-H, 52 F.P.C. 1604, 1636 (1974), aff'd, *Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1073-1074 (5th Cir. 1975), cert. denied, 426 U.S. 941 (1976)), and collapsed a number of pre-1973 vintages for separate producing areas into a single nationwide category. Order No. 749, 54 F.P.C. 3090 (1975), aff'd, *Tenneco Oil Co.* v. *FERC*, 571 F.2d 834, 841-842 (5th Cir.), cert. denied, 439 U.S. 801 (1978).

Thus, under the compromise embodied in the NGPA, Congress chose to treat old gas differently not by preserving for all time the particular *price ceilings* the Commission had established for various vintages of old gas, but rather by preserving the *regulatory authority* under which those ceilings were adopted (albeit limited by the NGPA's prohibition against lowering the ceilings). In other words, the compromise was to preserve traditional NGA regulation of wellhead prices for old gas while eliminating such regulation for new gas. Accordingly, the structure of the NGPA as a whole reinforces the Commission's authority under Sections 104(b)(2) and 106(c) to adopt Order No. 451.

2. In turning to the legislative history, respondents (Br. 41-43), like the court of appeals, rely solely on generalized floor statements by individual Members of Congress concerning the differing treatment of old and new gas, none of which suggests that the Commission is powerless to revise the vintage-pricing system and raise the ceiling price of old gas under "traditional NGA principles." *Mid-Louisiana Gas*, 463 U.S. at 333.[1]

On the other hand, statements by Senator Abourezk and Senator Kennedy *do* strongly reinforce the validity of the Commission's approach in Order No. 451 by making clear that under the NGA's "just and reasonable" standard, price ceilings need not be wholly "cost-based" and may used as an "incentive" to "elicit" and "bring forth" new supplies. 124 Cong. Rec. 30,018, 30,023 (1978); see FERC Br. 37. Respondents attempt (Br. 43) to minimize these statements on the ground that they were made by opponents of the NGPA, whose "fears and doubts" are not authoritative guides to the Act's meaning. Respondents miss the point. Senators Abou-

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[1] Respondents principally rely (Br. 42) on Senator Jackson's observation that the NGPA "concentrates" the rewards of higher prices on the development of new, high-cost gas, thereby encouraging production while protecting consumers from paying "unnecessarily high" prices for gas they could expect to receive at "lower prices" under "current policies." 124 Cong. Rec. 28,633 (1978). This description does not imply that the NGPA embodies an absolute prohibition against higher ceilings for old gas. In fact, Senator Jackson's reference to then-"current policies" indicates that the Commission may revise the vintage-pricing structure and utilize replacement-cost methodology for old gas after passage of the NGPA, just as it did before. Senator Domenici's statement that "deregulating" old gas was never suggested and that elimination of vintaging in the NGPA itself was "not doable," *id.* at 28,865, is not to the contrary. Order No. 451 does not "deregulate" old gas (see pages 14-15, *infra*), and Congress's failure to mandate elimination of vintage pricing for old gas when it enacted the NGPA scarcely suggests that the Commission was to be barred from doing so years later, in light of changed circumstances.

rezk and Kennedy opposed the NGPA because of the higher price ceilings and phased deregulation it provided for *new* gas, and they argued that the Commission already had sufficient authority under the NGA's "just and reasonable" standard to create incentives and elicit new supplies, thereby accomplishing many of the NGPA's objectives. The views of these Senators therefore cannot be discounted on the premise that they were opposed to applying the "just and reasonable" standard to the gas at issue here. In fact, the acknowledgement by two Senators who sought to hold down gas prices that the "just and reasonable" standard permits incentive-based price ceilings greatly weakens respondents' assertion that Congress was so single-minded in its desire to protect those consumers who were fortunate enough to have access to large supplies of old gas that it barred *any* increases in the overall price of such gas.

Respondents also essentially ignore the fact that Congress *rejected* a version of the NGPA that would have enacted the very regulatory scheme for old gas that they now insist is embodied in Sections 104 and 106. The House bill would have frozen the maximum lawful price of old gas at the just and reasonable rate established by the Commission before enactment of the NGPA, albeit increased by inflation. It would not have allowed the Commission to increase those ceilings on a generic basis; a producer would have been permitted to collect a higher price only under a special relief provision for high-cost gas. 123 Cong. Rec. 26,169 (1977) (§§ 405, 409). Borrowing from the Senate bill (*id.* at 32,306 (§ 3)), however, the bill reported by the Conference Committee and enacted into law as the NGPA retained the Commission's authority to regulate (and thereby increase) the price of old gas under the "just and reasonable" standard. FERC Br. 37-38. Respondents' submission that Sections 104(b)(2) and 106(c) only authorize the Commission to grant special relief from vintaged area or national rate ceilings on a case-by-case basis therefore is inconsistent with the settled rule that Acts of Congress are not to be construed implicitly to incorporate provisions that Congress specifically rejected. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

3. Finally, there is no basis for respondents' contention (Br. 8-18, 38-41) that Order No. 451 represents a dramatic break from prior administrative interpretations of Sections 104(b)(2) and 106(c) under which the Commission regarded its authority as limited to the granting of special relief. Not once in the materials respondents cite did the Commission state that its authority was limited in this manner and that it therefore could not increase price ceilings for old gas on a generic basis. To the contrary, in the first of the interpretations cited by respondents (Br. 10-11), the Commission stated, citing Sections 104(b)(2) and 106(c), that although the NGPA's ceiling prices generally struck the balance between consumer and producer interests, the Act reserved to the Commission "the authority to prescribe *higher* price ceilings in certain circumstances." Order No. 23, 44 Fed. Reg. 16,895, 16,897 & n.10 (1979).[2]

Respondents next rely (Br. 11-13, 38-39) on proposals published by the Commission between 1979 and 1984 to adopt procedures under Sections 104(b)(2) and 106(c) for granting special relief from area or national rate ceilings that was comparable to the relief available under rate orders issued pursuant to the NGA. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 770-774 (1968), aff'g 34 F.P.C. 159, 180, 226 (1965); 18 C.F.R. 2.56a(g), 2.56b(h), 2.75 (1980).[3] The Com-

[2] Respondents also quote (Br. 9-10) a letter from Commission Chairman Curtis to Senator Jackson, while the NGPA was under consideration, which stated that "[e]xcept in instances where the Commission receives applications for rates in excess of the maximum lawful prices under the NGPA (in which case it may establish a higher price if it meets just and reasonable standards), the Commission will no longer inquire into producer costs nor establish permissible rates of return." This passage does not suggest that the Commission would entertain only those applications that sought special relief from existing price ceilings, as distinguished from an increase in the ceilings themselves.

[3] This parallel was the basis for the Commission's statement, quoted by respondents (Br. 12), that Congress "provided a link

mission never suggested, however, that its authority under the "just and reasonable" standard in Sections 104(b)(2) and 106(c) might be confined to granting special relief from applicable rate ceilings and that it was therefore barred from increasing the ceilings themselves.

In fact, even prior to the Commission's withdrawal of the proposed rules governing special relief, the Commission stated in a final order cited by respondents (Br. 14-16) that "price inadequacies" for old gas and interstate gas subject to rollover contracts "could be remedied by either a special relief rulemaking or a new just and reasonable rate proceeding pursuant to sections 104(b)(2) and 106(c) of the NGPA." Order No. 107-A, 48 Fed. Reg. 45,097, 45,098 (1983). The Commission further explained that "[w]hile sections 104(b)(2), 106(c), and 109(b)(2) provide the Commission with statutory authority to establish at a minimum a special relief program, the Commission notes that the authority under these sections may extend much further." *Id.* at 45,101 n.14. The Commission cited for that proposition a 1982 Notice of Inquiry, in which it solicited comments on how to alleviate severe economic distortions that were beginning to plague the natural gas industry. *Impact of the NGPA on Current and Projected Natural Gas Markets*, 47 Fed. Reg. 19,157 (1982). In that Notice, which first identified many of the issues addressed by Order No. 451 (see J.A. 58-59), the Commission expressed its belief (supported by a legal memorandum appended to the Notice, 47 Fed. Reg. at 19,165-19,168) that it "may have the authority to eliminate vintaging in whole or in part under section 104 and to identify and establish

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between the NGA's special relief procedures and the NGPA in sections 104(b)(2) [and] 106(c)." 49 Fed. Reg. 21,910 (1984). The fact that the Commission has authority under Sections 104 (b)(2) and 106(c), by "order," to grant special relief from a vintaged price ceiling (which links those Sections to the prior special relief regulations) does not negate the Commission's authority, by "rule," to set a higher ceiling for "any category" of old gas (which links those Sections to the ceilings themselves).

a single maximum lawful price applicable to sections 104, 106 and 109 in order to mitigate potential market ordering problems." *Id.* at 19,162. This background refutes respondents' contention that the Commission previously fixed the limits of its authority under Sections 104(b)(2) and 106(c) in a way that is inconsistent with the approach it took in Order No. 451.[4]

II. Respondents further argue (Br. 47-57), apparently as an alternative ground for affirmance, that even if a higher price ceiling for old gas is lawful so long as it is "just and reasonable" within the meaning of the NGA, the ceiling in Order No. 451 does not satisfy that standard. But in making this argument, respondents all but ignore the Commission's exhaustive analysis of the issue. They do not challenge the Commission's finding that the prices permitted under the prior system of vintage pricing were unjust and unreasonable because they led to production disincentives, regional disparities, and other market distortions; the legality of the Commission's use of a replacement-cost methodology in setting a new ceiling under the just and reasonable standard; the data and factual findings on which the Commission relied in applying that methodology; or the validity of the Commission's ultimate conclusion that the particular ceiling it chose is just and reasonable. See Resp. Br. 20-21, 31, 47-48, 57. The sole points respondents make in arguing that this ceiling is not just and reasonable are based on quite different grounds. Both points are insubstantial.

A. First, respondents erroneously contend (Br. 48-52) that the revised price ceiling cannot be deemed just and reasonable because the Commission itself concluded when it promulgated Order No. 451 that it is a rate that "should not be collected." The Commission did not state

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[4] Even if the Commission had expressed a view to the contrary, that would not prevent the Commission from reexamining its initial interpretation in light of changed circumstances, especially in the exercise of its flexible "just and reasonable" ratemaking authority. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 863-864 (1984); see also *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990).

that it would be unjust and unreasonable for gas producers to collect prices up to the revised ceiling for old gas. To the contrary, the Commission repeatedly stated that the ceiling price is within a "zone of reasonableness" (see *Permian Basin*, 390 U.S. at 767) and therefore "just and reasonable" within the meaning of the NGA. See J.A. 43, 95, 112, 310, 311. The Commission simply found that it would not be appropriate for gas producers *automatically* to collect that rate simply by invoking the indefinite price escalator clauses contained in most producer-pipeline contracts—especially since the ceiling price was (and remains) above the market price. See J.A. 141, 310-311. The Commission therefore included the Good Faith Negotiation (GFN) procedure in Order No. 451 to ensure that a producer would collect the new ceiling price (or any other price above the prior ceiling) only from purchasers willing to pay it. FERC Br. 13-15, 40-42. The Commission's conclusion that the ceiling price adopted in Order No. 451 is just and reasonable for purposes of rate regulation did not somehow estop it from tailoring the implementation of that ceiling to mitigate its impact on purchasers and to prevent the market distortions that otherwise would have been created by widespread collection of above-market rates. After all, the NGA authorizes the Commission to regulate a natural gas company's "practices" as well as its "rates." § 5(a), 15 U.S.C. 717d(a).

Since the GFN procedure was intended to *protect* respondents and other pipelines and pipeline customers against automatic rate increases under price escalator clauses to which they had voluntarily agreed, it is rather odd for respondents to argue that the otherwise lawful ceiling in Order No. 451 is rendered unjust and unreasonable *because of* the GFN procedure. Undeterred, respondents object (Br. 50-52) to certain details of the GFN procedure as well, characterizing it as "hopelessly skewed in favor of producers" (Br. 50). This characterization is simply wrong. Respondents' principal complaint is that only the producer can initiate the GFN process (by requesting the pipeline to nominate the

price at which it would continue to purchase old gas under one or more contracts between the parties). See FERC Br. 14. This complaint ignores the fact that if the producer does *not* initiate the GFN process, the pipeline may continue to purchase old gas at the prior (lower) ceiling price; the pipeline therefore is no worse off by virtue of its inability to initiate the GFN process than it would be if there were no GFN process at all.[5]

Respondents' argument also misapprehends the purpose of the GFN process. That process was not designed to furnish an independent means for producers and pipelines to renegotiate their contracts as a general matter; it had the more limited purpose of providing some opportunity for a pipeline to mitigate the adverse effects of a price increase to which the producer would otherwise be automatically entitled under the contract. The pipeline therefore has no right to insist on an opportunity, equal to that of the producer, to achieve a net *advantage* in its overall bargaining position through the

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[5] Similarly, respondents disparage (Br. 51-52) the opportunity the GFN process affords a purchaser to renegotiate *any* contract with that producer covering at least some old gas and to terminate any such contract if the producer does not agree to the price the pipeline nominates; in respondents' view, a pipeline is unlikely to realize any net benefit from these features of the GFN process because the producer is unlikely to initiate that process unless it believes that the negotiations will work to its advantage. This complaint once again ignores the fact that a pipeline is no worse off by virtue of its inability to trigger the GFN process where the producer fails to do so, since the pipeline may then continue to purchase gas at prices that are unaffected by the new ceiling price in Order No. 451.

Respondents likewise err in asserting (Br. 51) that under the GFN process, "the producer has *no* incentive to reach any 'mutually agreed-upon price' other than the new ceiling price, and may use the threat of termination and abandonment to obtain it." If the new ceiling price is above the prevailing market price (as it has been since Order No. 451 was promulgated), the producer *will* have an incentive to agree to a below-ceiling price in order to sell the gas; otherwise the pipeline may exercise its right under the GFN process to terminate the contract and purchase gas elsewhere at the market price. See FERC Br. 14-15.

GFN process. Further, respondents' unfairness argument overlooks the Commission's assessment when it adopted Order No. 451 that the adverse effect on a particular purchaser as a result of its loss of a contract entitlement to a particular amount of old gas at a particular price by operation of the GFN process would be limited by virtue of the ready availability of alternative sources of supply at market-responsive prices. J.A. 304; see Pet. App. 54a (Brown, J., dissenting); FERC Br. 41-42.

B. Also without merit is respondents' contention (Br. 48, 52-57) that the pricing provisions of Order No. 451 are not just and reasonable because they "deregulate" the price of old gas. The old gas at issue here remains subject to the price ceiling specifically set forth in Order No. 451 itself. That ceiling was first adopted by the Commission for post-1974 old gas in the exercise of its NGA authority to regulate gas prices under the "just and reasonable" standard, and it is the very ceiling that the NGPA itself carries forward (as adjusted for inflation) for post-1974 old gas, expressly recognizing in the text of Section 104(b)(1)(A) that it had been "established by the Commission" as "just and reasonable."

It could not seriously be contended that the price of post-1974 old gas has been "deregulated" simply because the statutorily mandated ceiling for that gas now happens to be above the current market price for natural gas generally: that ceiling remains fully effective as a legal matter and it may again have teeth as a practical matter if the market price should rise substantially in the future. It follows that the price of other vintages of old gas to which the Commission extended the same ceiling in Order No. 451 likewise has not been "deregulated" simply because that ceiling is above the current market price. See *Martin Exploration*, 486 U.S. at 208-209 (noting that "market prices had plunged below the regulated price ceilings" and that a provision of law "deregulates" when it "sets no price ceiling at all").[6] Thus,

[6] This conclusion is consistent with the regulatory premises of the NGPA. Under that Act, "[a]ll maximum lawful prices are ceiling prices only. In no case may a seller receive a higher price than his contract permits." H.R. Conf. Rep. No. 1752, 95th Cong., 2d Sess. 74 (1978); see 15 U.S.C. 3311(b)(9) (codifying the rule of *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 333, 343 (1956), and *FPC* v. *Sierra Pacific Service Co.*, 350 U.S. 348, 353 (1956)). Consequently, "the sales price, given sufficient economic conditions, can be established at a point below that ceiling." *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 372 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). Because the NGA and NGPA permit rates to be negotiated by private parties, respondents err in relying (Br. 46, 54) on the discussion in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), of negotiated rates under the tariff-based rate system prescribed by the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*

Order No. 451 in no way conflicts with the Court's observation in *FPC* v. *Texaco*, 417 U.S. 380 (1974), quoted by respondents (Br. 55), that "the prevailing price in the market place cannot be the *final* measure of 'just and reasonable' rates." *Id.* at 397 (emphasis added).[7]

III. In addition to objecting to the new price ceiling in Order No. 451, respondents challenge (Br. 57-67) the provisions that grant prior authorization to a producer to abandon its contract service obligations to a purchaser

[7] In spinning out their "deregulation" theme, respondents refer (Br. 23, 25, 53, 58) to provisions of Order No. 451 that (i) pre-grant producers a blanket certificate of public convenience and necessity under Section 7(c) of the NGA to resell gas that is released under the GFN and abandonment provisions, and (ii) waive certain filing requirements under Section 4 of the NGA. J.A. 46, 164, 179-181. Respondents do not appear to present these points as distinct legal objections to the Order, and any such objections are not properly before the Court because they were not presented below or in the brief in opposition. In any event, the Commission has previously pre-granted certificates of public convenience and necessity on a generic basis, most prominently in the extensive proceedings on Order Nos. 436 and 500, cited in FERC Br. 46 n.18, concerning open-access pipelines. See 18 C.F.R. 284.221; *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 997 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988); *American Gas Ass'n* v. *FERC*, No. 87-1588 (D.C. Cir. Aug. 24, 1990), slip op. 33; see also *FPC* v. *Texaco*, 417 U.S. 380, 384 (1974). Similarly, the Commission waived filing requirements under the NGA when it granted regulatory relief to small producers. *FPC* v. *Texaco*, 417 U.S. at 384; *Permian Basin*, 390 U.S. at 786-787; 34 F.P.C. 159, 234-235 (1965); Order No. 428, 45 F.P.C. 454, 458 (1971); see 18 C.F.R. 157.40(c) and (d).

upon the occurrence of specified conditions. Those conditions are: the producer and purchaser were unable to reach agreement on a revised price for old gas within the framework of the GFN procedure; the purchaser elected not to continue to buy the gas in question at a price nominated by the producer; the producer has entered into a contract to sell the same gas to another purchaser; and the producer has given the purchaser 30 days notice. See FERC Br. 14-15, 40.

By permitting abandonment under these circumstances, the Commission did not, as respondents argue (Br. 57), "discard" the requirements of Section 7(b) of the NGA. To the contrary, as we explain in our opening brief (FERC Br. 38-44), the Commission complied with all three requirements prescribed by that Section. First, the Commission gave its "permission and approval" to abandonments of service upon the future occurrence of the specified protective conditions. FERC Br. 39-40; compare *FPC* v. *Moss*, 424 U.S. 494 (1976) (sustaining Commission's authority under Section 7(b) to give advance approval of abandonment). Second, the Commission made the requisite "finding" that the "present or future public convenience or necessity" justifies abandonment where those conditions have been satisfied among the parties concerned, both because it assures that the gas in question will promptly be made available to a willing purchaser, and because the availability of that option to the producer (along with the reciprocal right of the purchaser to terminate the contract) if the parties do not reach agreement under the GFN negotiating process creates an inducement for that process to work if it is invoked. FERC Br. 40-41 & n.16; cf. *FPC* v. *Moss*, 424 U.S. at 501.

Third, the Commission's approach is fully consistent with Section 7(b)'s provision for approval of abandonment "after due hearing." Both the just and reasonable ceiling price for old gas and the factors warranting abandonment where a purchaser is unwilling to pay that price (or some lower price acceptable to the producer) were resolved in the rulemaking proceedings on Order No. 451, in which respondents and all other interested

parties had an opportunity to participate. No individualized hearing is "due" with respect to the ceiling price or the standards of public convenience and necessity warranting abandonment under the Order, which are of market-wide applicability.[8] Moreover, respondents have not filed a complaint under 18 C.F.R. 385.206 suggesting the need for an individualized hearing because of a dispute about whether a particular producer is complying with the price ceiling or whether the requisite standards under Order No. 451 have been satisfied in connection with any particular abandonment. FERC Br. 42-44.

Respondents nevertheless assert (Br. 60-64) that the terms "due hearing" and "finding" in Section 7(b) require the Commission to make an individualized assessment of each proposed abandonment, even where the factors specified in Order No. 451 are concededly present, so that the Commission can consider each abandonment's "probable effects on consumers and all other interested persons" (Br. 61) and "all of the circumstances and equities involved" (Br. 64). Respondents do not and cannot deny that such a regime of individualized hearings and specific findings would, as the Commission found in promulgating Order No. 451, "substantially delay[]" and frustrate the achievement of the Order's generically established, consumer-oriented goals. J.A. 301-302; FERC Br. 43. Nor do respondents deny that this Court and other courts have uniformly rejected a claim of right to an individualized determination in comparable circumstances, even where the relevant statute expressly calls for a "hearing." See Resp. Br. 63-67, citing *Heckler* v. *Campbell*, 461 U.S. 458 (1983); *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Kansas Power & Light Co.* v. *FERC*, 851 F.2d 1479 (D.C. Cir. 1988); and *Associated Gas Distributors* v. *FERC*, 824 F.2d 981

[8] Section 16 of the NGA, 15 U.S.C. 717*o*, specifically provides that "[f]or the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters." See *Permian Basin*, 390 U.S. at 787.

(D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988); see also *American Gas Ass'n* v. *FERC*, No. 87-1588 (D.C. Cir. Aug. 24, 1990), slip op. 36-38.

Respondents seek to overcome this adverse precedent in two ways. First, they argue (Br. 62) that Order No. 451 is different because it "placed the entire abandonment squarely in the hands of the producer." See also Br. 65. This distinction is legally irrelevant, because nothing in Section 7(b) absolutely prohibits the Commission from giving advance approval to an abandonment that is initiated entirely by the producer, if that approach is otherwise consistent with the public convenience and necessity and the requisite standards for abandonment are satisfied. There is no need to resolve that question here, however, because the purchaser in fact plays a central role in bringing about an abandonment under Order No. 451. The GFN process can never be triggered in the first place unless the purchaser has entered into a contract with a producer that allows a price increase up to the new just and reasonable price ceiling prescribed by Order No. 451 (typically in an indefinite escalator clause). And the producer may not abandon service at the end of the GFN process unless the purchaser refuses to pay the ceiling price or some lower price acceptable to the producer. As a result, as the Commission explained, "abandonment occurs * * * only if the purchaser has chosen not to pay the price provided for under the contract, in effect terminating the contract." J.A. 305; see also J.A. 312 ("any contract termination occurs through the parties' mutual exercise of their rights," and therefore is not "unilateral").

Second, respondents point (Br. 63) to the discussion in *Heckler* v. *Campbell*, *FPC* v. *Texaco*, and *Storer Broadcasting* of an opportunity for the affected person to show that the regulation should not be applied to him. It is not clear, however, why such a provision should invariably be necessary, irrespective of the particular statutory scheme and regulation involved. See *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 601 n.44 (1981). For example, a price ceiling, such as the one in Order No. 451 that may lead to abandonment if the purchaser

refuses to pay it, is by nature a standard of general applicability that does not ordinarily admit of exceptions, at least in the absence of a showing that it is confiscatory or otherwise dramatically out of line in the circumstances.

Moreover, even if a court were to conclude that such a provision for special relief is necessary in the context of a particular rule, the appropriate remedy presumably would be to order the agency to entertain a petition for waiver or other relief in the exceptional case where such a petition has been filed and appears meritorious, not to strike down the rule itself. In *FPC* v. *Texaco*, for example, the Court cited a general regulation, issued pursuant to Section 16 of the NGA, that provided for the filing of petitions for waiver of Commission regulations under the NGA, but noted that the private party involved had not petitioned for such relief. 377 U.S. at 40 n.11 (citing 18 C.F.R. 1.7(b) (1963)). In this case, respondent Williams Natural Gas made a passing request for an exemption from Order No. 451 in its petition for rehearing (at 58) before the Commission, and it argued in its brief in the court of appeals (at 12-13) that the Commission was authorized by Section 16 of the NGA to grant it such an exemption and should have done so.[9] But we have been informed by the Commission that neither Williams nor any other purchaser ever filed a formal petition with the Commission for a waiver of the abandonment features of Order No. 451's GFN process. There accordingly is no occasion for the Court to address the need for or contours of any such special exemption here.[10]

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[9] The particular provision of the Commission's regulations cited in *FPC* v. *Texaco* that addressed the subject of waivers under Section 16 of the NGA is no longer in effect, but the Commission still may entertain such a petition under the catch-all filing provision in 18 C.F.R. 385.207(a)(5). Section 502(c) of the NGPA, 15 U.S.C. 3412(c), expressly provides for waivers ("adjustments") of provisions of the NGPA and implementing regulations and orders based on "special hardship, inequity, or an unfair distribution of burdens." See 18 C.F.R. 385.1101 *et seq.*

[10] Respondents do not attempt to defend the decision below to the extent its discussion of take-or-pay clauses in pipeline-producer

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER 1990

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contracts (see Pet. App. 29a-32a) might be read to hold that the Commission was required to implement a solution to the take-or-pay problem as between producers and pipelines prior to or in connection with any order raising the price of old gas. See Resp. Br. 67-70; FERC Br. 45-49. As respondents concede (Br. 68), the D.C. Circuit recently sustained the principal regulatory measure adopted by the Commission to reduce pipelines' take-or-pay exposure to producers. *American Gas Ass'n*, slip op. 25-33. Thus, the take-or-pay issue clearly furnishes no basis for invalidating Order No. 451. Contrary to respondents' suggestion (Br. 68), the fact that the Commission has not yet fully resolved the largely separate problem of allocating the take-or-pay costs absorbed by pipelines between the pipelines and their downstream customers, see *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989), cert. denied, No. 89-2016 (Oct. 9, 1990), is irrelevant to the validity of Order No. 451, which principally concerns the upstream relationship between producers and pipelines.

Order No. 451 did not make the take-or-pay problem worse. If what respondents erroneously regard as the one-sided nature of the GFN procedure led a producer not to initiate that procedure with respect to a particular pipeline, then Order No. 451 obviously had no effect on the pipeline's take-or-pay liability to that producer. Conversely, if a producer initiated the GFN process, the pipeline was free to insist upon renegotiation of any take-or-pay contracts with that producer that involved at least some old gas and to terminate the contracts if the producer did not agree. That opportunity can scarcely be said to "exacerbate" the take-or-pay issue (see Resp. Br. 69), and in fact many take-or-pay contracts have been renegotiated as a result of Order No. 451. FERC Br. 47-48. In short, Order No. 451 addressed the take-or-pay issue in an imaginative and effective manner within the scope of the old-gas pricing problem with which it was more immediately concerned.

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